

Fair Political Practices Commission
INTERNAL MEMORANDUM

To: Chairman Randolph, Commissioners Blair, Downey, Huguenin and Remy

From: Andreas C. Rockas, Commission Counsel, Legal Division
Carla Wardlow, Chief, Technical Assistance Division
Luisa Menchaca, General Counsel

Date: June 28, 2006

Subject: Prenotice Discussion of Proposed Amendments to Regulation 18754 -
Statements of Economic Interests for Members of Boards or Commissions
of Newly Created Agencies.

I. EXECUTIVE SUMMARY

This memorandum proposes amendments to a relatively new regulation: regulation 18754. That regulation interprets and implements section 87302.6 of the Political Reform Act (“Act”).¹ The regulation and section at issue state the economic interest disclosure requirements for members of governing boards or commissions of newly created agencies.

The aim of the proposed amendments to regulation 18754 is, in one instance, to narrow one reporting exception and, in other instances, to reduce the number of nearly-duplicative filings required of certain governing board members of new agencies. Specifically, the proposed amendments are meant to exempt a governing board member of a new agency from filing another Statement of Economic Interests (“SEI”) where, at the time of taking his or her seat on the new board, he or she was already a public official subject to equal or greater disclosure obligations.

The aim of the proposed amendments is to close an unintended reporting gap created by the relatively new regulation, while simultaneously eliminating nearly-duplicative disclosure in other instances. The need for such an amendment was identified by the Commission’s Technical Assistance Division (“TAD”).

II. BACKGROUND

Public officials subject to the conflict-of-interest provisions of the Act, including officeholders and certain public employees, as well as candidates for public office, are required to file SEI’s whereby they disclose their “economic interests” as defined by the

¹ Government Code sections 81000 – 91014. Commission regulations appear at title 2, sections 18109 – 18997, of the California Code of Regulations. All further references to “section” are to the Government Code, and all references to “regulation” are to title 2 of the California Code of Regulations, unless otherwise indicated.

Act. (See sections 87200 et seq. and 87300 et seq.) The SEI's are signed under penalty of perjury and, once filed, are made available to the public upon request. (Sections 81004, 81008.) The Commission and other agencies have the authority to levy penalties (civil, administrative and criminal) when SEI's are not submitted in a timely manner or are found to be inaccurate.

Although SEI's do not directly identify and disclose conflicts of interest, the information provided in them alerts public officials to potential conflicts of interest and provides the monitoring public with the information needed to assess the existence of conflicts of interest between a public official's interests and his or her official duties.

All public officials fall into one of two categories of SEI filers created by the Act. (See section 82026 [defining "filer"].) The first category of filers, governed by sections 87200 et seq., includes most high-ranking elected officeholders.² The second category of filers, governed by sections 87300 et seq., covers all positions in a state or local government agency "which involve the making or participation in the making of decisions which may foreseeably have a material effect on any financial interest . . ." and are not covered by section 87200. (Section 87302(a).) People holding these positions are informally referred to as "designated employees" or "87300 filers" and their positions are listed in conflict of interest codes which each governmental agency in California is required to adopt and promulgate. (Section 87300; see section 82019 [defining "designated employee"].)

Most designated employees of an agency are required by their conflict of interest codes to disclose less than 87200 filers because their duties are, typically, not as broad as the duties of 87200 filers. Even so, the highest-ranking members of agencies not listed in section 87200 (e.g., heads of state agencies, appointed governing board members, and supervisory employees of some cities and counties) are still often required to provide "full" or 87200-like disclosure of their economic interests, even though such members are "designated employees" pursuant to section 87300 and their agency's conflict of interest code.

Section 87302.6,³ effective January 1, 2003, dictates how SEI's are to be filed by a subcategory of "designated employees" – members of boards and commissions of newly created agencies not listed in section 87200. Prior to section 87302.6, members of boards and commissions of newly created agencies did not have to file SEI's until after a conflict of interest code was created and adopted by the new agency. Since a new

² These 87200 filers (sometimes referred to as "statutory filers") include, for example, elected state officers, judges, members of certain state commissions like the FPPC, heads of local government bodies, those who manage public investments, and candidates for any of the elected offices in this category. These officials are subject to the most expansive disclosure requirements possible under the Act due to the nature of their duties.

³ The text of section 87302.6 (which was part of SB 1620, Stats. 2002, Chapter 264) and various legislative analyses thereof are attached to former Legal Division Counsel Kenneth L. Glick's February 19, 2003 memorandum to the Commission proposing adoption of regulation 18754, which implements section 87302.6.

conflict of interest code can sometimes take nearly a year to create and implement, many board and commission members, appointed to new agencies prior to the advent of section 87302.6, were making broad-ranging governmental decisions without having provided any information to the public regarding their economic interests. The Legislature sought to remedy this dearth of information by implementing section 87302.6. That section states:

“Notwithstanding Section 87302, a member of a board or commission of a newly created agency shall file a statement at the same time and in the same manner as those individuals required to file pursuant to Section 87200. A member shall file his or her statement pursuant to Section 87302 once the agency adopts an approved conflict-of-interest code.”

Therefore, section 87302.6 obligates a member of a board or commission of a newly created agency (state or local) to make full or 87200-like disclosure of his or her economic interests relative to the jurisdiction of the new agency. After adoption and implementation of the new agency’s conflict of interest code, the member is to file pursuant to the new code.

To facilitate the implementation of section 87302.6, the Commission adopted regulation 18754 on March 27, 2003, and entitled it “Statements of Economic Interests (Members of Board or Commissions of Newly Created Agencies); When and Where to File.” Subdivision (a) of regulation 18754 states:

“(a) Applicability:

(1) Pursuant to Government Code section 87302.6, a member of a governing board or commission of a newly created agency shall disclose his or her economic interests pursuant to Government Code sections 87202 through 87210. This requirement applies until such time as the member is included in an approved conflict-of-interest code in effect for the governing board or commission of which he or she is a member.

(2) For purposes of Government Code section 87302.6, ‘newly created agency’ means any state agency or local government agency, as defined in Government Code sections 82003, 82041, and 82049, which has come into existence on or after January 1, 2003.

(3) Exceptions

(A) A person who is listed or enumerated in Government Code section 87200 is not subject to this section.

(B) A person who is a member of a board or commission of a newly created agency is not subject to this section, when that board or

commission does not possess decisionmaking authority as defined in 2 Cal. Code Regs. section 18701(a)(1).”

Aside from detailing when and where persons subject to section 87302.6 must file their SEI’s (in subdivisions (b) & (c)), regulation 18754 clearly describes only two categories of people who are currently excepted from its scope. (See regulation 18754(a)(3).)

The two exceptions in regulation 18754 cover: (A) a person who holds a position listed in Government Code section 87200, and (B) a person who is a member of a board or commission of a newly created agency that does not possess decisionmaking authority pursuant to section 18701(a)(1). The (imperfect) rationale for the first exception is that 87200 filers already have full disclosure obligations and any reporting under the regulation would, therefore, be redundant. The reason the rationale is imperfect is because although all 87200 filers have “full” disclosure obligations, full disclosure is defined according to the geographical jurisdiction of the 87200 filer in question. (See sections 82030 [definition of “income”]; 82033 – 82035 [definitions of “interest in real property,” “investment,” and “jurisdiction”]; 87201 – 87209.) For example, the full disclosure obligation of an official who is an 87200 filer by virtue of his being the city treasurer of a small city, is much narrower than the full disclosure obligation of an 87200 filer who is a member of the Public Utilities Commission, which has statewide jurisdiction. One of the proposed amendments attempts to close a reporting gap resulting from this distinction.

The rationale for the second exception is that these officials, having no decisionmaking authority, should not be required to disclose economic interests that they cannot affect by their participation on that board or commission.

III. PROPOSED REGULATORY ACTION

The proposed regulation seeks to fine tune the SEI disclosure requirements placed upon members of governing boards of newly created agencies. As previously stated, before the effective date of section 87302.6 in January 2003, members of governing boards of newly created agencies could make governmental decisions for nearly a year before having to disclose any of their economic interests, due to the time it takes for a new agency to develop and adopt a conflict of interest code. After section 87302.6 was implemented, that changed.

A. The Problems Currently Not Being Addressed By Regulation 18754

Since March 2003, *all* members of governing boards of newly created agencies with decisionmaking authority – who were not 87200 filers by virtue of some other governmental position they already held – have been obliged to file new full-disclosure SEI’s. (Regulation 18754(a)(3).) However, this rule contains an exception that is arguably too broad, in one instance, and mandates over reporting in another instance. First, the exception applying to all 87200 filers, regardless of the geographic scope of the

jurisdiction that obligated them to disclose under section 87200, is arguably too broad, thus creating a reporting gap. In contrast, the lack of a reporting exception for officials who are already disclosing as much or more relevant information about their economic interests before assignment to a new agency, has given rise to over reporting.⁴

B. A Solution: Proposed Amendments To Subdivision (a)(3)

In order to (1) narrow the reporting exception to less than *all* 87200 filers, and (2) mitigate the burden of nearly-duplicative disclosures, staff proposes the following substantive amendments to subdivision (a)(3) of regulation 18754.

(a) Applicability:

¶ ... ¶

(3) ~~Exceptions~~ A member of a governing board or commission of a newly created agency is not subject to this regulation if:

(A) ~~A person who is listed or enumerated in Government Code section 87200 is not subject to this section. The member also holds a position specified in Government Code section 87200 and the geographical jurisdiction of the newly created agency is the same as or is wholly included within the jurisdiction in which the member must report his or her economic interests pursuant to article 2 of chapter 7 of the Political Reform Act, Government Code sections 87200 et seq.~~

(B) The member is also designated in a conflict of interest code for another agency and all of the following apply:

(i) The geographical jurisdiction of the newly created agency is the same as or is wholly included within the jurisdiction of the other agency;

(ii) The disclosure assigned to the member in the code of the other agency is the same as that required under article 2 of chapter 7 of the Political Reform Act, Government Code section 87200 et seq.; and

(iii) The filing officer is the same for both agencies.

(C) The newly created agency was formed as a result of the merger of two or more agencies and all of the following apply:

(i) The member served on the governing board or commission of an agency abolished in the merger in substantially the same capacity as the member will serve on the governing board or commission of the newly created agency;

(ii) The geographical jurisdiction of the newly created agency is the same as the jurisdiction of the abolished agency; and

(iii) The member was previously subject to the same disclosure as required for persons listed in Government Code section 87200.

⁴ Agencies are prohibited from requiring more disclosure than is necessary to comply with the Act. (*In re Alperin* (1977) 3 FPPC Ops. 77; *Carmel-by-the-Sea v. Young* (1970) 2 Cal.3d 259.)

~~(B-D) A person who is a member of a~~ The board or commission of a newly created agency is not subject to this section, when the board or commission does not possess decisionmaking authority as defined in 2 Cal. Code Regs. section 18701(a)(1).

Where before there were only two subsections under subdivision (a)(3), now there are four – all describing a different class of members of newly created governing boards excepted from the application of regulation 18754. The proposed amendments to subsection (A), and the addition of new subsections (B) and (C) are substantive in that they affect the scope of who must make full disclosure pursuant to section 87302.6. Suggested new subsection (D) is simply a re-designation and non-substantive rewording of old subsection (B).

1. Subsection (A)

The intent of the proposed amendments to subsection (A) is to close a gap in the reporting regime. To understand, consider the following hypothetical:

Hypothetical #1: Ms. Duright has been the treasurer for Smalltown, California for 5 years. Pursuant to section 87200, she has full disclosure obligations, but only relative to the geographic area of Smalltown. Ms. Duright has an economic interest in a chain of dry cleaners in California. She (properly) does not report this economic interest on her annual SEI's since the chain at issue is not located in or doing business in Smalltown.

Ms. Duright's most recent, annual SEI was filed on April 1, 2006. On June 1, 2006, Ms. Duright was appointed to sit on the governing board of a newly created state agency called the Toxic Waste Agency, which enforces and promulgates law governing the disposal of certain types of chemicals, including those used by dry cleaners. As a statewide agency, the Toxic Waste Agency covers a much greater geographic jurisdiction than Smalltown.

Under current subsection (A), Ms. Duright – an 87200 filer – would be exempt from the obligations of 18754 and would not, therefore, have to file another SEI until the Toxic Waste Agency designs and implements its conflict of interest code. But because Ms. Duright's "full disclosure" obligations do not extend beyond the border of Smalltown, no one could know by looking at her past SEI's that she has an economic interest in a business that could be directly affected by her decisions as a board member of the new Toxic Waste Agency.

For these reasons, the exempting language of subsection (A) has been narrowed. Under the proposed amendment, Ms. Duright would not be exempt from having to file a new *statewide* full disclosure SEI within 30 days of being appointed to the governing board of the Toxic Waste Agency.

2. Subsection (B)

The aim of the proposed amendment to subsection (B) is to reduce the near-duplicative disclosure obligations under which certain members of newly created agencies currently labor. This new subsection would mandate that persons already subject to disclosure under the auspices of their initial agency, generally would not have to file again under the newly created agency, unless the jurisdiction and/or scope of disclosure of the second agency was greater than that of the first agency. To illustrate, consider the following hypothetical:

Hypothetical #2: For 3 years, Ms. Duright has been an appointed member of the governing board of the Health & Welfare Agency which has statewide jurisdiction; her position is not listed in section 87200. Pursuant to sections 87300 et seq. and the Health & Welfare Agency's conflict of interest code, Ms. Duright is obliged to provide full-disclosure of her statewide economic interests on an annual basis.

Ms. Duright has an economic interest in a chain of dry cleaners in California. She reported that economic interest in her most recent annual SEI, which she filed on April 1, 2006. On June 1, 2006, Ms. Duright was appointed to sit on the governing board of a newly created agency, the Toxic Waste Agency. As a state agency, the Toxic Waste Agency has the same geographic jurisdiction as the Health & Welfare Agency. Ms. Duright's new appointment is not subject to Senate confirmation. Both agencies will use the Commission as their filing officer.

Pursuant to current regulation 18754, Ms. Duright was obliged to file another full-disclosure SEI by July 1, 2006,⁵ even though she just filed a full-disclosure SEI only 3 months earlier. For this reason, new subsection (B) creates a filing exemption for those sitting on the boards of newly created agencies if: (i) the geographical jurisdiction of the newly created agency is the same as or is wholly included within the jurisdiction of the agency they are already serving; (ii) the disclosure assigned to the member of the initial agency is the same as that required pursuant to sections 87200 et seq.; and (iii) the filing officer is the same for both agencies.⁶

Therefore, under the proposed amendment to subsection (B), Ms. Duright would not have to file an SEI on or before July 1, 2006. She would simply file her next SEI pursuant to her annual disclosure obligation stemming from her work on the Health & Welfare board, or under the Toxic Waste Agency's new conflict of interest code (as long as it also required full disclosure).

⁵ Regulation 18754(b)(1)(B) states that members of governing boards of newly created agencies, whose appointments are not subject to confirmation, must file an assuming office statement not more than 30 days after assuming office.

⁶ A similar provision already exists for designated employees under regulation 18730(b)(3).

3. Subsection (C)

Subsection (C) institutes a very similar function as subsection (B) in that it reduces the frequency of reporting obligations currently incumbent upon those board members whose previous scope of reporting would not change due to the merger of one or more agencies. Consider the following hypothetical:

Hypothetical #3: For 3 years, Ms. Duright has been an appointed member of the governing board of the Health & Welfare Agency which has statewide jurisdiction; her position is not listed in section 87200. Pursuant to sections 87300 et seq. and the Health & Welfare Agency's conflict of interest code, Ms. Duright is obliged to provide full-disclosure of her statewide economic interests on an annual basis.

Ms. Duright has an economic interest in a coal factory in California. She reported that economic interest in her most recent annual SEI, which she filed on April 1, 2006. Soon after, the governor signed an order abolishing the Health & Welfare Agency and another statewide agency, the Particulate Matter Agency, and merging their functions into one entity called the State Public Health Agency.

On June 1, 2006, Ms. Duright was appointed to sit on the governing board of the newly-created State Public Health Agency. Her new position requires her to serve in substantially the same capacity as she served on the board of her old agency, i.e., making decisions about statewide public health issues. As a state agency, the State Public Health Agency has the same geographic jurisdiction as the old Health & Welfare Agency. Ms. Duright's new appointment is not subject to Senate confirmation.

Pursuant to current regulation 18754, Ms. Duright was obliged to file another full-disclosure SEI by July 1, 2006, even though she just filed a full-disclosure SEI only 3 months earlier. For this reason, new subsection (C) creates a filing exemption for those sitting on the boards of newly created agencies if: (i) the member served on the governing board of an abolished agency in substantially the same capacity as the member will serve on the newly created agency's board; (ii) the geographical jurisdiction of the newly created agency is the same as the jurisdiction of the abolished agency; and (iii) the member was previously subject to the same disclosure as required for persons listed in section 87200. In applying this subsection, a case-by-case determination would have to be made as to what constitutes serving "in substantially the same capacity".

Therefore, under the proposed amendment to subsection (C), Ms. Duright would not have to file an SEI on or before July 1, 2006. She would simply file her next SEI pursuant to her annual disclosure obligation stemming from her work on the Health & Welfare board, or under the State Public Health Agency's new conflict of interest code, if it is in effect.

4. Subsection (D)

As explained above, the changes suggested for subsection (D) are non-substantive.

5. Non-Substantive Changes

In other portions of regulation 18754, staff has made some non-substantive changes to the wording to conform to be more consistent with other regulations in the Act, e.g., we removed the hyphens from the phrase “conflict of interest code” in subdivision (a)(1), and changed the word “section” to “regulation” where appropriate.

C. Staff Recommendations

Staff recommends that the Commission approve the proposed amendments to regulation 18754 for adoption at its September meeting.

Attachment

Proposed Amendments to Regulation 18754.